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Daniel Blinka

Last June 1993 the U.S. Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals.*[1] The Court's decision concerns the evidentiary standards governing the admissibility of expert scientific evidence. *Daubert* changed the law in the Seventh Circuit and raises serious questions about the test presently applied in Wisconsin state courts.

Daubert touches potentially the entire spectrum of expert evidence. Civil litigation and, to a lesser extent, criminal trials frequently feature one or more experts testifying on a variety of topics, often in opposition to one another. Credit or blame for the flowering of expert testimony often is attributed to the Federal Rules of Evidence (FRE), which has been adopted in varying forms in nearly 40 states, including Wisconsin, over the last 20 years.

The use of expert witnesses invites issues about the admissibility of their testimony. Although most jurisdictions follow some version of the Federal Rules of Evidence, state courts and federal circuits failed to achieve any consensus on how the rules regulate the admissibility of expert evidence. The failure was all the more remarkable because the courts were by and large dealing with identically worded rules.

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Daubert v. Merrell Dow Pharmaceuticals changes the law of evidence in the Seventh Circuit and fosters a host of new questions in state courts.

In 1984 the Wisconsin Supreme Court resolved all uncertainties regarding the test governing the admissibility of expert evidence in Wisconsin. In *State v. Walstad*[2] the court confirmed that Wisconsin adheres to a relevancy standard: if a properly qualified expert is able to offer testimony relevant and helpful to the issues in the case, his or her testimony is admissible. *Walstad* further clarified that the so-called *Frye* test of general acceptance within the scientific community was not a prerequisite to admissibility, even though it remained a viable standard for the taking of judicial notice.[3]

The certainty engendered by *Walstad* stood in marked contrast to the chaos in the federal courts, where the circuits warred over the correct standard. A majority of the circuits, including the Seventh Circuit, maintained that the *Frye* test survived the advent of the Federal Rules of Evidence.[4] Other circuits opted for the relevancy approach (like Wisconsin's) or the somewhat more demanding "*Downing* test," first articulated by the Third Circuit and representing a hybridization of the relevancy and general acceptance approaches.[5]

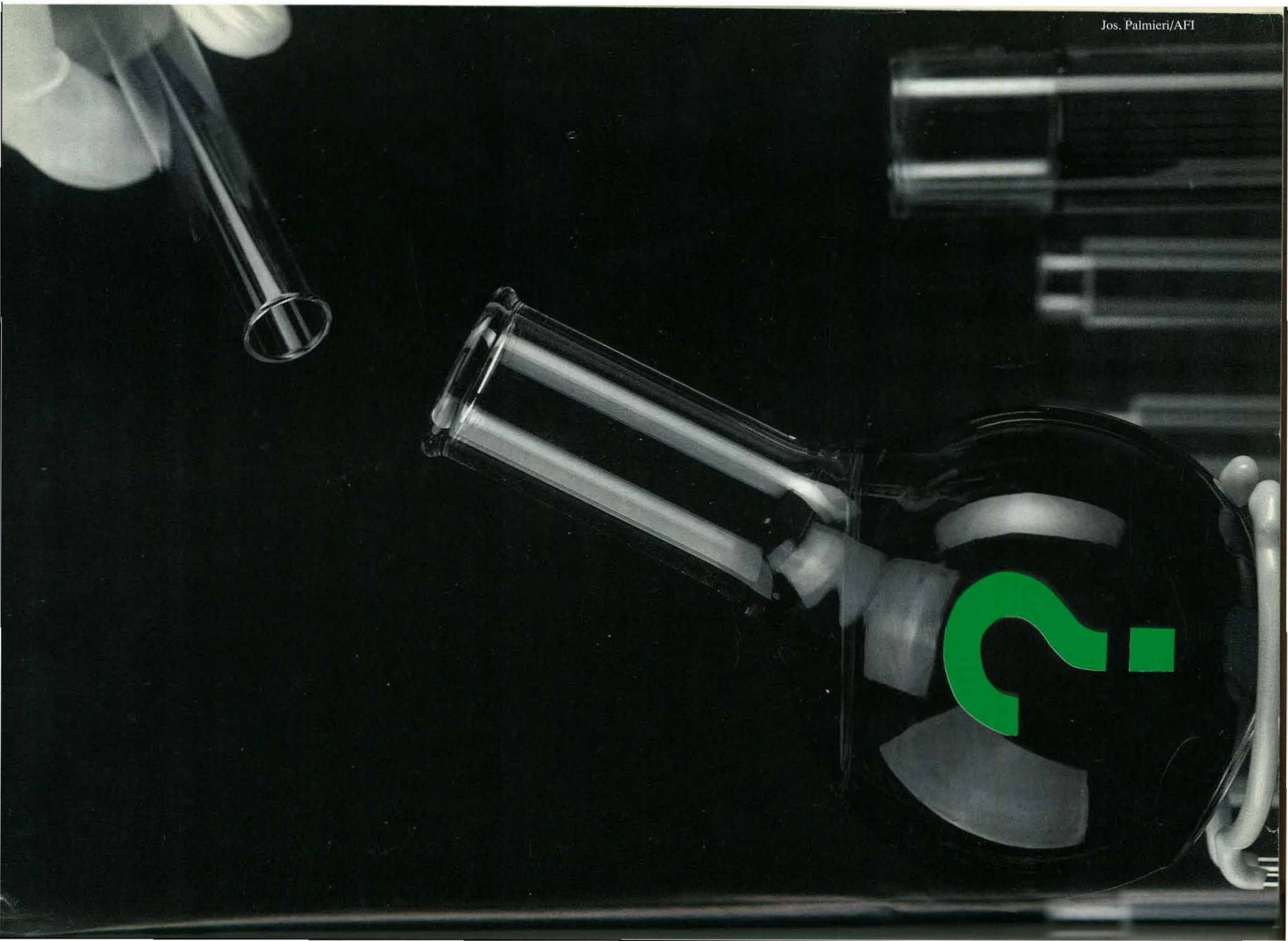
On June 28, 1993, the U.S. Supreme Court finally entered the fray in *Daubert.* The Court quickly and efficiently assigned the *Frye* test to oblivion as the sole criterion of admissibility. Instead, it offered a host of "general observations" that inevitably will lead to a reassessment of the general relevancy test set forth in *Walstad.*

Daubert is significant for the Wisconsin lawyer because it changed the law of evidence in the Seventh Circuit and will foster a myriad of new questions in state courts. This article reviews the *Daubert* decision and explains how it invites a reappraisal of *Walstad.*

The *Daubert* case

The plaintiffs in *Daubert* were two children born with birth defects. The children alleged that their injuries were caused by their mother's ingestion during pregnancy of Bendectin™, an anti-nausea drug manufactured by the defendant, Merrell Dow Pharmaceuticals. The defendant moved for summary judgment on the ground that there was insufficient proof that Bendectin was a teratogen (a substance causing abnormalities). Both sides presented conflicting scientific evidence from experts bearing impressive credentials. Plaintiffs' scientific evidence featured animal-cell studies, "live-animal studies" and the "reanalysis" of epidemiological (statistical) data prepared in connection with other studies.

The trial court granted the summary judgment motion. The district court ruled that the reanalysis evidence failed to meet the general acceptance *(Frye)* test and that the remaining scientific evidence was insufficient to raise a jury question on causation. The Ninth Circuit affirmed.


Jos. Palmieri/AFI

The U.S. Supreme Court, in a decision written by Justice Blackmun, reversed and ordered the matter remanded for further proceedings. Chief Justice Rehnquist, joined by Justice Stevens, concurred in part and dissented in part.

The Court held unanimously that "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence."[6] The entire Court agreed that the "baseline" for admissibility is found in the relevancy rules of FRE 401 and 402, which are identical to their Wisconsin counterparts. Moreover, the rules articulate a liberal standard of relevancy.[7] The admissibility of scientific evidence is, however, also governed by FRE 702, which allows expert witnesses to testify about scientific, technical or other specialized knowledge that will assist the trier of fact in determining a fact in issue. Nothing in the language of FRE 702 or its drafting history suggested that the rule incorporated the *Frye* test. Although the Court unanimously agreed that *Frye* did not control the admissibility of scientific evidence under the federal rules, the justices parted company on the precise interplay of the rules.

The *Daubert* criteria for admissibility

The majority of the Court offered some general observations on the admissibility of scientific evidence. These remarks, which comprise the bulk of Justice Blackmun's opinion, were addressed specifically to trial judges faced with the bewildering task of mediating conflicts between experts on highly specialized or abstruse subjects.

The Court acknowledged the liberal orientation of the Federal Rules of Evidence, but cautioned that the rules stop short of granting carte blanche to expert testimony. Specifically, trial judges must screen expert testimony: "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[8] Rule 702 "clearly contemplates some degree of regulation of the subject and theories about which an expert may testify."[9]

With pedantic precision, Justice Blackmun parsed the subtle meanings inherent in the phrase "scientific knowledge." He explained that the reliability or trustworthiness of scientific knowledge depended upon the fealty of the theory or technique to the scientific method, which involves repeated testing and refinement as a way of establishing the validity of the procedure or idea. Moreover, Rule 702 provides that expert evidence is admissible only where it will assist the trier of fact. And in assessing the helpfulness of the evidence, the trial judge must determine the fit between the expert evidence and the facts of the case.

In short, scientific validity ultimately turns on the purpose for which the evidence is offered. Justice Blackmun offered as an example evidence concerning the phases of the moon. The existence of a full moon may help a jury decide how dark it was on a given night, but lunar phases have no bearing on a person's irrational behavior on that same evening.

Without seeing any paradox in its assumptions, the majority of the Court cautioned that expert testimony must be restricted because of the wide latitude allowed experts under the federal rules. Experts are freed from the traditional requirement that opinions be predicated upon first-hand knowledge. Unlike a lay witness, an expert can predicate an opinion on inadmissible hearsay under Rule 703. Relaxation of the first-hand knowledge rule is justified only where the expert's opinion has "a reliable basis in the knowledge and experience of his discipline."[10]

Thus, the trial judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning can be applied to the facts in issue."[11] The judge's determination is governed by Rule 104(a), meaning that the rules of evidence generally are inapplicable to the issue of admissibility and the judge must be convinced of the validity and fit of the proffered scientific testimony by a preponderance of the evidence. To assist the trial judges in this task, the Court offered a number of general observations without presuming to set forth a definitive checklist or test. None of the factors outlined by the Court were extensively discussed or explained.

First, a key question is whether the theory or technique has been tested. The Court referred to several authorities that discussed the importance of rigorously testing theories or techniques to determine whether they can be falsified.[12]

The second consideration is whether the theory or technique has been subjected to peer review and publication. The Court explained that publication was a relevant factor but the presence or absence of publication was not dispositive in assessing scientific validity. Justice Blackmun observed that some techniques or theories "are too particular, too new, or of too limited interest to be published," thus suggesting that the trial court should consider the reasons why there was no publication.[13]

Third, the trial court must consider the scientific technique's "known or potential rate of error ... and the existence and maintenance of standards controlling the technique's operation." The reference to standards would seem to refer to the existence of established protocols or published methodologies. No indication was given of what, if any, statistical criteria established an acceptable rate of error.[14]

Fourth, the general acceptance of a theory or technique is an important, although not controlling, factor. Justice Blackmun observed: "Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique that has been able to attract only minimal support within the community' ... may properly be viewed with skepticism."[15]

In short, the Court demoted the *Frye* test in the evidentiary pantheon but it would be a mistake to dismiss the general acceptance test as dead or no longer worth worrying about.

Daubert's impact on Wisconsin

Wisconsin's relevancy approach shares critical common ground with the *Daubert* approach. Both *Walstad* and *Daubert* agree that relevancy is the baseline of admissibility. Moreover, both cases reflect an abiding faith in the adversary system and the abilities of jurors. The Wisconsin Supreme Court in *Walstad* observed that the critical considerations for admissibility are the expert's qualifications and the relevancy of the testimony; weaknesses in the expert's testimony may be brought out on cross-examination or through impeachment.

Echoing similar themes, the U.S. Supreme Court in *Daubert* reaffirmed its belief that lay jurors, assisted by the adversary system, would not be befuddled by "absurd and irrational pseudoscientific assertions." In particular, Justice Blackmun noted that: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[16]

Despite the existence of common ground, there are critical differences between the *Walstad* relevancy approach and the *Daubert* approach. *Daubert* contemplates a far more active screening role for the trial judge than anything suggested in *Walstad*. Although the two cases are not necessarily inconsistent with one another, neither are they identical: *Daubert* raises the level of scrutiny contemplated by *Walstad's* relevancy test to the fifth power. In addition to the four

criteria discussed above, the U.S. Supreme Court in *Daubert* also admonished trial judges to be mindful of other applicable rules (all of which have nearly identical Wisconsin counterparts).

Rule 703 allows experts to base opinions on inadmissible evidence but only if it is of a type that is reasonably relied upon by experts in the field in reaching such conclusions. Rule 706 also permits the courts to appoint their own experts. Finally, Rule 403 allows the trial judge to exclude relevant evidence where its probative value is substantially outweighed by other considerations, such as confusion of the issues or misleading the jury. The Court also suggested that Rule 403 permits the trial judge *more* control over expert than lay witnesses because "[e]xpert evidence can be both powerful and quite misleading."

Thus, *Daubert* portrays a more expansive screening role for the trial judge than the bare determination of the witness's qualifications and the relevancy of his or her testimony as required by *Walstad*. Despite its paean to the liberal orientation of the federal rules, *Daubert* exudes considerable skepticism about scientific theories and techniques that fall outside the mainstreams of the experts' disciplines.

Daubert raises significant problems and questions

The *Walstad* approach affords broad admissibility of expert evidence; it is exceptionally difficult to exclude proffered expert evidence under its mandate. And in that sense it affords Wisconsin lawyers some degree of certainty when preparing for trial.

Daubert may pose more questions than it resolves. Although the Court expressed confidence that trial judges will be able to navigate the shoals and eddies of science, Chief Justice Rehnquist in his dissent pointed out the vagaries inherent in the criteria posed by the majority.[17] *Daubert* is a vote of confidence for trial judges but leaves them with precious little instruction on how to decide in a particular case between contending scientists on some arcane point. Perhaps the key to *Daubert* is Justice Blackmun's understated reminder that the proponent of the admissibility of scientific evidence carries the burden of proof. To put it another way, the proponent must convince the trial judge that it is more likely than not that the evidence is reliable and fits the facts of the case. If the judge just does not know which expert to believe, the evidence must be excluded because the proponent failed to meet the burden of proof.

Equally troubling is that the *Daubert* criteria address only scientific knowledge; the Court expressly declined to discuss how its analysis applied to the technical or other specialized knowledge that also is referred to in Rule 702. What is science? Is there a difference between science and the other areas of expertise mentioned in Rule 702? If so, how do we tell when an expert is a scientist or nonscientist? For example, is medicine a science, and if it is what are we to make of Wisconsin decisions that refer to it as being an art?[18] The prime virtue of *Walstad* is that it offers a test that applies across the board to all species of experts. It does not force difficult, and probably futile, distinctions between science, technology and other specialized knowledge.

Finally, one wonders whether *Daubert* is anything more in its effect than the *Frye* general acceptance standard by another name. The general acceptance test may not have survived the federal rules as the sole criterion of admissibility, but it nevertheless continues to play a large role in *Daubert*. The Court explicitly stated that general acceptance remains as an important factor bearing on the trustworthiness of the scientific theory or technique. And the other three factors ad-

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Evidence *(from page 13)*

vanced by the Court (albeit in a cursory fashion) all seem to bear on general acceptance as well: 1) has the technique or theory been tested; 2) has it been published or otherwise subjected to peer review; and 3) is there an established rate of error or standard of performance? In short, all three of these criteria appear to be alternative ways of gauging general acceptance within a scientific community: the *Frye* test.

What happens now in Wisconsin?

Daubert undoubtedly will spawn a reexamination of *Walstad* as lawyers contend that proffered expert evidence fails to meet the *Daubert* standard of admissibility. The argument will be that virtually all of the Federal Rules of Evidence discussed in *Daubert* are identical to their counterparts in the Wisconsin Rules of Evidence. Such contentions may be furthered by the observation that, in broad outline, *Daubert* is consistent with *Walstad*, perhaps representing only a refinement of the relevancy approach.

Wisconsin state courts are not, of course, obligated to adopt *Daubert*. Although the corresponding state and federal evidentiary rules are worded identically and arise from the same model, the interpretation of the Wisconsin Rules of Evidence remains a subject of state law. The Supremacy Clause of the federal constitution does not force Wisconsin to join the *Daubert* Court in lockstep.

In all likelihood, Wisconsin will witness a period of uncertainty as the trial courts and appellate courts struggle to determine whether *Walstad* survives *Daubert*. Nor should the focus be kept on the state courts alone. *Daubert* poses so many potentially troubling questions that it is likely that the U.S. Supreme Court may have to revisit the issue to provide some firmer guidance on such questions as the applicability of the Court's criteria to nonscientific evidence.

Endnotes

[1]*Daubert v. Merrell Dow Pharmaceuticals,* 113 S. Ct. 2786 (1993).
[2]*State v. Walstad,* 119 Wis. 2d 483, 351 N.W.2d 469 (1984).
[3]*Walstad,* 119 Wis. 2d at 518-19.
[4]*See, e.g., United States v. Tranowski,* 659 F.2d 750 (7th Cir. 1981).
[5]*See State v. Blair,* 164 Wis. 2d 64, 78, 473 N.W.2d 566, 572, n.9 (Ct. App. 1991) (discussion by Fine, J.).
[6]*Daubert,* 113 S. Ct. at 2793.
[7]*Id.* at 2794.
[8]*Id.* at 2795.
[9]*Id.*
[10]*Id.* at 2796.
[11]*Id.*
[12]*Id.* at 2796-97.
[13]*Id.* at 2797.
[14]*Id.*
[15]*Id.* at 2797, quoting *United States v. Downing,* 753 F.2d 1224, 1238 (3rd Cir. 1985).
[16]*Daubert,* 113 S. Ct. at 2798.
[17]*Id.* at 2800 (Rehnquist, C.G., dissenting in part).
[18]*E.g., Beacon Bowl Inc. v. Wisconsin Elec. Power Co.,* 176 Wis. 2d 740, 784, 501 N.W.2d 788, 806 (1993) ("electricity is not an inexact art like medicine"). ■